

NO. PD-0236-20

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

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COURT OF CRIMINAL APPEALS
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THE STATE OF TEXAS

APPELLANT

V.

TIMOTHY WEST

APPELLEE

**THE STATE'S BRIEF ON APPELLEE'S
PETITION FOR DISCRETIONARY REVIEW**

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-18-00190-CR,
TRIAL COURT CAUSE NUMBER 20180D03392,
CRIMINAL DISTRICT COURT NO. ONE OF EL PASO COUNTY, TEXAS**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES	iii-iv
STATEMENT OF THE CASE	v-vi
STATEMENT OF FACTS	1-3
SUMMARY OF THE STATE’S ARGUMENTS	4-5
STATE’S REPLY TO APPELLEE’S GROUNDS PRESENTED	6-25
<u>REPLY TO SOLE GROUND:</u> The Eighth Court correctly interpreted this Court’s precedent in <i>Hernandez v. State</i> and <i>Marks v. State</i> when it held that the prior and subsequent indictments alleged the same conduct and shared the same factual basis; therefore, the original indictment tolled the statute of limitations, and all the counts of the subsequent indictment fell within the three-year statute of limitations.	6-25
PRAYER	26
SIGNATURES	26
CERTIFICATE OF COMPLIANCE	27
CERTIFICATE OF SERVICE	27

INDEX OF AUTHORITIES

FEDERAL CASES

<i>United States v. Davis</i> , 953 F.2d 1482 (10th Cir. 1992)	17
<i>United States v. Gengo</i> , 808 F.2d 1 (2d Cir. 1986)	16
<i>United States v. Hill</i> , 494 F. Supp. 571 (S.D.Fla. 1980)	9, 16

STATE CASES

<i>Ahmad v. State</i> , 295 S.W.3d 731 (Tex.App.–Fort Worth 2009, pet. ref’d) . .	10, 24
<i>Brice v. State</i> , No. 14-13-00935-CR, 2015 WL 545557 (Tex.App.–Houston [14th Dist.] Feb. 10, 2015, no pet.) (mem.op., not designated for publication)	7, 11
<i>Ex parte Brooks</i> , No. 12-06-00378-CR, 2011 WL 165446 (Tex.App.–Tyler Jan. 19, 2011, pet. ref’d) (mem.op., not designated for publication)	12, 22, 24
<i>Ex parte Martin</i> , 159 S.W.3d 262 (Tex.App.–Beaumont 2005, pet. ref’d)	12
<i>Hernandez v. State</i> , 127 S.W.3d 768 (Tex.Crim.App. 2004)	4, 8-10, 20-21
<i>Lenox v. State</i> , No. 05-10-00618-CR, 2011 WL 3480973 (Tex.App.–Dallas Aug. 9, 2011, pet. ref’d) (not designated for publication)	11
<i>Marks v. State</i> , 560 S.W.3d 169 (Tex.Crim.App. 2018)	4, 13-15, 17-18, 22
<i>Sledge v. State</i> , 953 S.W.2d 253 (Tex.Crim.App. 1997)	10
<i>State v. Alvear</i> , No. 10-16-00203-CR, 2018 WL 4016337 (Tex.App.–Waco Aug. 22, 2018, pet. ref’d) (mem.op., not designated for publication)	7

State v. West, 597 S.W.3d 4 (Tex.App.—El Paso 2020, pet. granted) vi, 16-20

STATUTES

TEX. CODE CRIM. PROC. art. 12.01 7

TEX. CODE CRIM. PROC. art. 12.05 7-8

TEX. HEALTH & SAFETY CODE § 481.129 1

STATEMENT OF THE CASE

Timothy West, Appellee in the Court of Appeals below and Petitioner here, was initially indicted for the felony offense of knowingly possessing or attempting to possess a controlled substance, Tramadol, on or about three specific dates, by misrepresentation, fraud, forgery, deception, or subterfuge, which indictment was later dismissed by the State. (CR: 21-23, 99).¹ Appellee was then re-indicted for the felony offense of knowingly possessing or attempting to possess a controlled substance, Oxycodone, by misrepresentation, fraud, forgery, deception, or subterfuge, on or about the same three dates as alleged in the original indictment, which indictment was dismissed by the trial court. (CR: 168-71); (RR2: 15). Appellee was then re-indicted again for possessing or attempting to possess Oxycodone by misrepresentation, fraud, forgery, deception, or subterfuge, on or about the same three dates as alleged in the original indictment, and a tolling paragraph was added to the indictment. (CR: 8-10). Appellee filed a motion to quash the third indictment. (CR: 113-14). After a hearing, the trial court granted the motion to quash and dismissed the indictment. (CR: 210). The State timely

¹ Throughout this brief, references to the record will be made as follows: references to the clerk's record will be made as "CR" and page number, references to the reporter's record will be made as "RR" and page number, and references to exhibits will be made as either "SX" or "DX" and exhibit number.

filed its notice of appeal. (CR: 211-12). On February 14, 2020, the Eighth Court of Appeals reversed the judgment of the trial court and remanded the case for further proceedings. *State v. West*, 597 S.W.3d 4, 10 (Tex.App.—El Paso 2020, pet. granted). On June 24, 2020, this Court granted Appellee’s petition for discretionary review but did not permit oral argument.

STATEMENT OF FACTS

On September 13, 2016, the State indicted Appellee (the original indictment) for three counts of knowingly possessing or attempting to possess a controlled substance, Tramadol, by misrepresentation, fraud, forgery, deception, or subterfuge, in violation of Texas Health & Safety Code § 481.129. *See* TEX. HEALTH & SAFETY CODE § 481.129; (CR: 21-23). All three counts of the indictment alleged that on or about the dates of January 21, 2015 (Count 1), April 2, 2015 (Count 2), and June 5, 2015 (Count 3), Appellee “did then and there knowingly possess or attempt to possess a controlled substance, to wit: Tramadol by misrepresentation, fraud, forgery, deception, or subterfuge.” (CR: 21-23). The case was assigned cause number 20160D04320. (CR: 21-23).

The State re-indicted Appellee (the second indictment) on June 5, 2018, for three counts of knowingly possessing or attempting to possess a controlled substance, Oxycodone, by misrepresentation, fraud, forgery, deception, or subterfuge, on the same three dates as alleged in the original indictment, and thereafter dismissed the original indictment on June 13, 2018. (CR: 99, 168-71). After a hearing, the trial court dismissed the second indictment because it failed to show on its face that the trial court had jurisdiction over the matter, as the limitations period had expired, and no tolling language was present in the second

indictment. (RR2: 15).

To rectify this deficiency, the State then re-indicted Appellee (the third indictment) on June 26, 2018, for three counts of knowingly possessing or attempting to possess a controlled substance, Oxycodone, by misrepresentation, fraud, forgery, deception, or subterfuge, on the same dates as alleged in the original indictment, and added an identical, tolling paragraph to each count:

And it is further presented in and to said court that during the period from the 13th day of September, 2016, until the 13th day of June, 2018, an indictment charging the above offense was pending in a court of competent jurisdiction, to wit, cause number 20160D04320 in the Criminal District Court One of El Paso County, Texas, styled the State of Texas vs. Timothy West.

(CR: 8-10, 172-75).

On July 9, 2018, Appellee filed a motion to quash the third indictment on limitations grounds, challenging the application of the tolling rules. (CR: 113-14). At the hearing on the motion to quash, Appellee argued that changing the controlled substance alleged to have been possessed or attempted to be possessed from Tramadol to Oxycodone in the third indictment created a new offense and also changed the punishment range from a third-degree felony to a second-degree felony. (RR5: 6-7). Appellee further argued that his defense counsel had investigated the allegations regarding Tramadol, but that he did not have adequate

notice to investigate the same allegations regarding Oxycodone, a different controlled substance, and that the facts had been obscured by the passage of time. (RR5: 10-11, 13). In response, the State argued that the original indictment tolled the running of the limitations period because it alleged the same act – the possession or attempted possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge, albeit Tramadol and not Oxycodone – stemming from the same conduct on the same dates as alleged in the third indictment, such that the third indictment was timely and not barred by the statute of limitations. (RR5: 16-17, 19). After hearing the matter and considering the parties’ arguments, the trial court granted Appellee’s motion to quash the third indictment. (CR: 210). The State timely filed its notice of appeal. (CR: 211-12). On February 14, 2020, the Eighth Court of Appeals reversed the judgment of the trial court and remanded the case for further proceedings. *West*, 597 S.W.3d at 10. On June 24, 2020, this Court granted Appellee’s petition for discretionary review.

SUMMARY OF THE STATE’S ARGUMENTS

Summary of the State’s reply to Appellee’s sole ground accepted for review:

The Eighth Court correctly applied this Court’s precedent in *Hernandez v. State*,² where this Court held that a prior indictment would toll the statute of limitations under article 12.05(b) of the Code of Criminal Procedure for a subsequent indictment when both indictments alleged the same conduct, same act, or same transaction. In this case, the original indictment alleged possession or attempted possession of Tramadol by misrepresentation, fraud, forgery, deception, or subterfuge, and the subsequent indictment alleged possession or attempted possession of Oxycodone, on the same dates and under the same fraudulent manner as alleged the original indictment. The Eighth Court held that the facts of this case were analogous to *Hernandez* and that the original and subsequent indictments alleged the same conduct. The Eighth Court also held that the gravamen of the offenses in the original and subsequent indictments was also the same: possession or attempted possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge, thereby correctly applying the precedent in *Marks v. State*.³ As such, in spite of Appellee’s

² *Hernandez v. State*, 127 S.W.3d 768, 774 (Tex.Crim.App. 2004).

³ *Marks v. State*, 560 S.W.3d 169, 171 (Tex.Crim.App. 2018).

hypothetical-example arguments that, in essence, seek the overruling of *Hernandez*, the Eighth Court correctly held that the original indictment tolled the statute of limitations and that the third indictment therefore fell within the three-year statute of limitations.

STATE’S REPLY TO APPELLEE’S GROUNDS PRESENTED

REPLY TO SOLE GROUND: The Eighth Court correctly interpreted this Court’s precedent in *Hernandez v. State* and *Marks v. State* when it held that the prior and subsequent indictments alleged the same conduct and shared the same factual basis; therefore, the original indictment tolled the statute of limitations, and all the counts of the subsequent indictment fell within the three-year statute of limitations.

UNDERLYING FACTS

The State here relies on and adopts the recitation of facts set out in the statement of facts above.

ARGUMENT AND AUTHORITIES

In his sole ground accepted for review, Appellee claims the Eighth Court of Appeals erred when it held that the prior and subsequent indictments alleged the same conduct and shared the same factual basis such that the original indictment tolled the statute of limitations, and by arriving at such a holding, the Eighth Court misread this Court’s binding precedent in *Hernandez v. State* and *Marks v. State*. *See* (Appellee’s brief at 7-15). Appellee’s claim is without merit because the Eighth Court correctly interpreted and applied this Court’s binding precedent in *Hernandez v. State* and *Marks v. State*.

I. The statute of limitations and tolling

The statute of limitations for a violation of Texas Health & Safety Code §

481.129 is three years. *See* TEX. CODE CRIM. PROC. art. 12.01(7). “The time during the pendency of an indictment ... shall not be computed in the period of limitation.” TEX. CODE CRIM. PROC. art. 12.05(b). “During the pendency” means the period beginning with the day the indictment is filed in a court of competent jurisdiction and ending with the day that such accusation is, by order of a trial court having jurisdiction thereof, determined to be invalid for any reason. TEX. CODE CRIM. PROC. art. 12.05(c); *Brice v. State*, No. 14-13-00935-CR, 2015 WL 545557, at *2 (Tex.App.–Houston [14th Dist.] Feb. 10, 2015, no pet.)(mem.op., not designated for publication). In other words, “during the pendency” means that a charging instrument will toll limitations until it is found to be invalid. *See State v. Alvear*, No. 10-16-00203-CR, 2018 WL 4016337, at *3 (Tex.App.–Waco Aug. 22, 2018, pet. ref’d)(mem.op., not designated for publication).

II. The Eighth Court of Appeals correctly interpreted *Hernandez v. State* and *Marks v. State* when it held that the prior and subsequent indictments alleged the same conduct and shared the same factual basis such that the original indictment tolled the statute of limitations.

A. *Hernandez v. State* held that a prior indictment would toll the statute of limitations under article 12.05(b) for a subsequent indictment when both indictments alleged the same conduct, same act, or same transaction.

In *Hernandez*, this Court tackled a matter of first impression in interpreting article 12.05(b) of the Texas Code of Criminal Procedure, which permits tolling of

the statute of limitations during the pendency of an indictment, information, or complaint. TEX. CODE CRIM. PROC. art. 12.05; *Hernandez*, 127 S.W.3d at 770. In *Hernandez*, the appellant was originally indicted, within the limitations period, for possession of amphetamine on or about a specific date, and later re-indicted, outside the limitations period, for possession of methamphetamine on or about that same specific date, with the State asserting that the pendency of the first indictment had tolled the limitations period for the subsequent indictment. *Hernandez*, 127 S.W.3d at 769, 774. In upholding the trial court’s denial of the appellant’s motion to quash the subsequent indictment, this Court used statutory-construction principles and examined Federal opinions that interpreted the Federal analogue to article 12.05(b), the indictment-tolling provision. *Id.* at 769-74. Notably, this Court explained that allowing a “prior indictment to toll the statute of limitations would not defeat the purposes of the statute of limitations if the prior indictment gives adequate notice of the substance of the subsequent indictment. If the defendant has adequate notice of a charge, he can preserve those facts that are essential to his defense.” *Id.* at 772. This Court also explained that a subsequent indictment outside the limitations period would be barred if it broadened or substantially amended the charges in the original indictment. *Id.* at 773.

In its analysis, this Court approvingly reviewed the Federal district-court opinion in *United States v. Hill*, which emphasized the factual basis of an indictment over the specific charge alleged in determining whether a second indictment was proper under the Federal analogue to article 12.05(b). *Hernandez*, 127 S.W.3d at 773; *United States v. Hill*, 494 F. Supp. 571, 573-74 (S.D.Fla. 1980)(the original indictment charged tax evasion, and the subsequent indictment charged attempted tax evasion; the court held both indictments charged the same conduct and explained that the factual basis of an indictment, rather than the specific charge alleged, was crucial in determining that the second indictment was proper under the Federal analogue to article 12.05(b); holding the subsequent indictment was proper). Notably, the indictment in *Hill* was changed from tax evasion to attempted tax evasion, which could in theory allow for a broader spectrum of facts supporting guilt, yet this change did not sway either the district court nor this Court to conclude that the prior and subsequent indictments relied on different facts.

After completing its analysis, this Court held a prior indictment would toll the statute of limitations under article 12.05(b) for a subsequent indictment when both indictments alleged the same conduct, same act, or same transaction.

Hernandez, 127 S.W.3d at 774. This Court then applied its holding to the facts of

that case, holding the prior indictment and subsequent indictment alleged the same conduct, as both indictments charged the appellant with possession of a controlled substance on or about a certain date, with only the controlled substance itself changing. *Id.* Specifically, this Court explained, “[b]oth charges rest on essentially the same proof: the appellant possessed a controlled substance. Although the proof involved in identifying the drug would be slightly different, every other element would rest on the same proof.” *Id.* As a result, this Court held that because the prior and subsequent indictments alleged the same conduct, the limitations period for the subsequent indictment was tolled during the pendency of the prior indictment. *Id.* Notably, the fact that the indictment contained “on or about” date language, which only requires that the State prove the offense occurred prior to the presentment of the indictment and within the limitations period, and not on the exact date alleged in the indictment, *see Sledge v. State*, 953 S.W.2d 253, 256 (Tex.Crim.App. 1997), did not sway this Court to conclude that the prior and subsequent indictments relied on different facts.

The courts of appeals have consistently followed the holding in *Hernandez* and held that a prior indictment tolled the statute of limitations for a subsequent indictment when both alleged the same conduct, same act, or same transaction, such that the subsequent indictment was not barred by the statute of limitations.

See, e.g., Ahmad v. State, 295 S.W.3d 731, 740-42 (Tex.App.–Fort Worth 2009, pet. ref’d)(holding the first indictment, which alleged that the appellant buried a training bomb on or about January 26, 2002, and the second indictment, returned outside the two-year limitations period, which alleged that the appellant made a false report about a bomb and possessed a hoax bomb on or about January 26, 2002, arose from the same conduct – the appellant’s possession of and report about some kind of bomb – on January 26, 2002, such that the first indictment tolled the statute of limitations, and the second indictment was timely and not barred); *Brice*, 2015 WL 545557, at *2 (holding, when a subsequent indictment for possession of child pornography on or about September 23, 2009, was returned outside the three-year limitations period, that the statute of limitations was tolled and the subsequent indictment was timely because it alleged the same conduct as the prior indictment for promotion of, or possession with intent to promote, child pornography on or about November 23, 2008, despite the different offense dates and different offenses charged); *Lenox v. State*, No. 05-10-00618-CR, 2011 WL 3480973, at *10 (Tex.App.–Dallas Aug. 9, 2011, pet. ref’d)(not designated for publication)(holding, when a subsequent indictment for aggravated assault with a deadly weapon was returned outside the limitations period, that the statute of limitations was tolled because the prior indictment for intoxication assault shared

the same factual basis – the criminal conduct of striking the victim with a motor vehicle that occurred on or about a specific date – and that the appellant had adequate notice to defend himself against the charges and preserve the facts that were essential to his defense, despite the fact that different offenses were charged and the subsequent indictment subjected him to a greater penalty range); *Ex parte Brooks*, No. 12-06-00378-CR, 2011 WL 165446, at *6 (Tex.App.–Tyler Jan. 19, 2011, pet. ref'd)(mem.op., not designated for publication)(holding that when a subsequent indictment alleging a theft, or thefts committed as a continuing course of conduct, with an aggregate amount between \$20,000 and \$100,000, was returned outside the limitations period, the statute of limitations was tolled because the prior indictment, which alleged only a single theft of between \$20,000 and \$100,000, fairly alerted the defendant to the subsequent charges against her, as the indictments shared the same factual basis, despite the fact that the subsequent indictment subjected the defendant to a greater penalty range, and the defendant was on notice to preserve any facts or defenses available to her for any thefts she committed against the individual named in the indictment); *but see Ex parte Martin*, 159 S.W.3d 262, 263-65 (Tex.App.–Beaumont 2005, pet. ref'd)(holding a prior indictment for aggravated burglary committed sometime before September 30, 1998, did not toll the statute of limitations for a subsequent indictment,

returned outside the limitations period, for bail jumping on or about May 22, 2001, when the appellant failed to appear at the trial for the aggravated-burglary charge, because these indictments alleged different conduct and had different factual bases).

B. *Marks v. State* held that the original indictments did not toll the statute of limitations for the amended indictments because they did not allege the same conduct, same act, or same transaction.

This Court further refined its analysis and holding from *Hernandez* in *Marks v. State*. In *Marks*, the original indictments charged the appellant with providing security services without a proper business license. *Marks*, 560 S.W.3d at 170. The State later amended the indictments, outside the limitations period, to charge the appellant with accepting employment as a security officer to carry a firearm without a security-officer commission. *Id.* The court of appeals held the original and amended indictments did not allege the same conduct, the same act, or the same transaction. *Id.* This Court agreed, explaining that the original indictments alleged the appellant operated an unlicensed business, whereas the amended indictments alleged he accepted employment to carry a firearm without being personally commissioned to be a security officer. *Id.* at 170-71. This Court further explained that, “[u]nder the amended indictments, Appellant did not even need to actually provide security services – the act alleged in the original

indictments. And to provide security services under the original indictments, Appellant need not have carried a firearm or entered into any agreement to do so.” *Id.* at 171. This Court then examined the gravamina of the offenses, explaining, “[t]here are some common requirements for obtaining a security services license and a security officer commission, but a security officer commission, which allows the carrying of a firearm, involves some extra requirements.” *Id.* This Court then posed a question that even if a defendant did have a license to operate a security-service business and was facing the original indictments, what would make him think that he would have to defend against an allegation that he carried a firearm without being commissioned, again distinguishing the gravamina of the offenses. *Id.* Finally, this Court explained that the indictments did not allege much facts and simply tracked their respective statutes, and that the “on or about” date language did not make clear that the State alleged the same transaction, much less the same act or conduct, such that the original indictments did not toll the limitations period. *Id.*

In his dissent, joined by Judges Hervey and Newell, Judge Keasler disagreed that the two sets of indictments alleged impermissibly divergent conduct. *Marks*, 560 S.W.3d at 172 (Keasler, J., dissenting). Specifically, Judge Keasler explained that both sets of indictments targeted the same three incidents

on the same three dates and that the offenses were similar, which was all that *Hernandez* required. *Id.* at 172-73. Judge Keasler also explained that *Hernandez* did not hold “on or about” date language prevented a finding that two indictments described the same transaction. *Id.* at 173. He further explained that at the very least, the indictments alleged the same transaction, as each corresponding indictment alleged the same date, and the two sets of three indictments matched up day-for-day, which made it unlikely that the appellant was “initially preparing to defend against allegations pertaining to one span of time, and then was surprised to learn that he would have to defend against allegations pertaining to another.” *Id.* at 173-74. Judge Keasler continued, “[w]ith three day-for-day matches, it is far more likely that [the appellant] understood both indictments to target the same transaction.” *Id.* Judge Keasler concluded that *Hernandez* instructed courts to construe article 12.05(b) broadly, but instead the majority opinion took a narrow view of the statute. *Id.* at 174.

C. The Eighth Court correctly interpreted this Court’s precedent in *Hernandez v. State* and *Marks v. State* when it held that the prior and subsequent indictments alleged the same conduct and shared the same factual basis such that the original indictment tolled the statute of limitations.

Appellee first asserts the Eighth Court misread *Hernandez*. *See* (Appellee’s brief at 8-11). Specifically, he claims that because the subsequent indictment in

this case, as compared to the *Hernandez* indictment, could theoretically allow for greater permutations in the combination of facts (as acknowledged by the Eighth Court), he could theoretically become liable under this subsequent indictment for three new actions, such that the original indictment and subsequent indictment do not share the same factual basis, and therefore he could not preserve potential, alternative defenses. *See* (Appellee’s brief at 10); *West*, 597 S.W.3d at 8.

However, as discussed above, this Court in *Hernandez* approvingly relied on *United States v. Hill*, in which the original indictment charged tax evasion and the subsequent indictment charged attempted tax evasion, *see Hill*, 494 F. Supp. at 573-74, yet this change to an “attempt” offense, which could in theory allow for a broader spectrum of facts supporting guilt, did not sway either the district court nor this Court to conclude that the prior and subsequent indictments relied on different facts. This Court in *Hernandez* also approvingly relied on *United States v. Gengo*, which allowed a later superceding indictment that changed and/or added to the original conspiracy charge to toll the statute of limitations, even though the superceding indictment could also in theory allow for a broader spectrum of facts supporting guilt. *See United States v. Gengo*, 808 F.2d 1, 2-4 (2d Cir. 1986). This Court also relied on *United States v. Davis*, which held the original conspiracy indictment was tolled by a superceding conspiracy indictment, even though the

superceding indictment contained a “slightly different mix of closely related statutory violations as objects of the conspiracy,” as the essential nature of the conspiracy alleged in the first indictment remained the same, even though the superceding indictment could theoretically allow for a broader spectrum of facts supporting guilt. *See United States v. Davis*, 953 F.2d 1482, 1491 (10th Cir. 1992). Finally, the “on or about” date language in *Hernandez*, which in theory could also allow the State to prove up an entirely different date in the subsequent indictment, did not sway this Court to conclude that the prior and subsequent indictments relied on different facts. *See, e.g., Marks*, 560 S.W.3d at 173 (Keasler, J., dissenting). As such, the Eighth Court did not misread or misapply the precedent in *Hernandez*, because the “attempt” offense or “on or about” date language did not sway this Court to conclude that the prior and subsequent indictments relied on different facts.⁴

Despite Appellee’s above arguments, the Eighth Court explained, “[t]his case is too closely analogous to *Hernandez* for us to hold anything other than that the first and third indictments in this case alleged the same conduct.” *West*, 597

⁴ Appellee’s complaint about the “on or about” date language, taken to its logical extreme, would make it impossible for an original indictment to ever toll the statute of limitations for a subsequent indictment, as the date of the offense could fall on any day of the limitations-period time span, thus theoretically increasing the spectrum of facts supporting guilt, and thus preventing the State from ever relying on article 12.05(b) to toll the statute of limitations.

S.W.3d at 8. The Eighth Court also explained that even if Appellee could theoretically be liable under the subsequent indictment “for three entirely new and discrete actions previously ignored by the State, the first indictment still gave West sufficient notice that ‘fairly alerted’ him that he could be held accountable for a specific umbrella of conduct in order for him to contemplate preserving facts that might be essential to his defense.” *Id.* The sufficient notice was evident from the three discrete dates the State alleged in the original and subsequent indictments, as each corresponding indictment alleged the same date, and the original and subsequent indictments matched up day-for-day, which made it unlikely that Appellee was “initially preparing to defend against allegations pertaining to one span of time, and then was surprised to learn that he would have to defend against allegations pertaining to another.” *See* (CR: 8-10, 21-23); *Marks*, 560 S.W.3d at 173-74 (J. Keasler, dissenting). And just as Judge Keasler stated, “[w]ith three day-for-day matches, it is far more likely that [the appellant] understood both indictments to target the same transaction,” and likewise in this case, it is also far more likely that Appellee understood that both indictments targeted at least the same transaction, if not the same conduct or act, given the three specific dates. *Marks*, 560 S.W.3d at 174 (J. Keasler, dissenting). Furthermore, unlike the facts in *Hernandez* or *Marks*, here the State also alleged

the dishonest/fraudulent manner in which Appellee possessed or attempted to possess a controlled substance – by misrepresentation, fraud, forgery, deception, or subterfuge – thereby making it that much more likely that Appellee understood both indictments targeted at least the same conduct, act, or transaction.

Next, Appellee claims the Eighth Court misinterpreted *Marks* when it distinguished *Marks* on the basis that it “confined the application of its case to those cases in which the gravamen of law-offending conduct for the charges within a prior and subsequent indictment could never intertwine.” *See* (Appellee’s brief at 12-15); *West*, 597 S.W.3d at 9. Based on this, Appellee then argues the Eighth Court necessarily reasons that “tolling should occur unless it would be impossible for the allegations in both indictments to overlap,” and further asserts the Eighth Court’s analysis permits “tolling in every case where overlap between the indictments is at least possible.” *See* (Appellee’s brief at 14-15). However, this analysis is a stretch too far, as this is not what the Eighth Court held. Instead, the Eighth Court simply looked to this Court’s illustration in *Marks* that distinguished the gravamen of the offenses in the first set of indictments versus the gravamen of the offenses in the second set of indictments and used this analysis to examine the gravamen of the indictments in the present case. The Eighth Court explained, “[h]ere, in contrast, the gravamen of law-offending conduct for the charges in the

first and third indictments are the same: possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.” *West*, 597 S.W.3d at 9. Thus, the Eighth Court correctly understood *Marks* to require, in addition to an examination of the facts underlying the original indictment, a comparison of the gravamen of the offenses alleged in the original and subsequent indictments as part of its analysis, and in so comparing, the Eighth Court correctly determined that the gravamen in the original and third indictments was the same. *Id* (contrasting the different gravamina in *Marks*, whereas “[h]ere, in contrast, the gravamen of law-offending conduct for the charges in the first and third indictments are the same: possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge. We thus find *Marks* distinguishable from the present case.”).⁵

III. Appellee’s hypothetical-example argument asks this Court, in essence, to overrule *Hernandez*.

Appellee’s hypothetical-example argument, which complains that an appellee would be unable to preserve facts when the identity of the controlled substance is later changed in a subsequent indictment, undermines this Court’s

⁵ The Eighth Court’s analysis of *Marks* is reasonable in light of *Hernandez*, in which the first and subsequent indictments also shared the same gravamen – possession of a controlled substance. *See Hernandez*, 127 S.W.3d at 774.

holding in *Hernandez*. See (Appellee’s brief at 16-17). For example, using an analogous-hypothetical example, under the facts of *Hernandez*, Appellee’s hypothetical-example argument would be that an appellee would investigate facts pertaining to the appellee’s alleged possession of amphetamine under the first indictment on or about a specific date, but that the appellee would not be on notice he should also investigate the possession of any other controlled substance on or about that same date or preserve defenses as to the same because he could face subsequent charges. Under this logic, the appellee would then argue he did not have notice to investigate other defenses because the subsequent indictment, even though it also alleges possession of a controlled substance on or about that same date, could be proven using different facts and a different date due to the “on or about” date language, and that he may have had other defenses he did not know to preserve. Therefore, Appellee’s hypothetical-example argument would conclude that the original indictment in *Hernandez*, and any indictment with “on or about” date language or that alleged a different controlled substance, could never put an appellee on notice he could be later be charged with possession of a different controlled substance on or about the same date. However, this logic and argument was expressly rejected by this Court in *Hernandez*, where the Court held that “[b]oth charges rest on essentially the same proof: the appellant possessed a

controlled substance.” *See Hernandez*, 127 S.W.3d at 774.

Appellee’s hypothetical-example argument also fails under the facts of this case because the indictments, which allege three separate dates, match up day-for-day and also allege that he possessed or attempted to possess the controlled substance through dishonest/fraudulent means, such that it is highly unlikely Appellee was “initially preparing to defend against allegations pertaining to one span of time, and then was surprised to learn that he would have to defend against allegations pertaining to another.” *Marks*, 560 S.W.3d at 173-74 (J. Keasler, dissenting). Simply, there is no confusion here. The original indictment fairly alerted Appellee to the allegation that he possessed or attempted to possess a controlled substance through dishonest/fraudulent behavior on specific dates.

Appellee also claims that his hypothetical-example argument is only applicable to the facts of this case, and is not realistically applicable to similar cases. *See* (Appellee’s Brief at 17-18). For example, in *Ex parte Brooks*, Appellee states that the statute of limitations was tolled because “the proof of each offense would be essentially the same.” *See* (Appellee’s brief at 18); *Ex parte Brooks*, 2011 WL 165446, at * 6. In *Ex Parte Brooks*, the court held that when a subsequent indictment alleging a theft, or thefts committed as a continuing course of conduct, with an aggregate amount between \$20,000 and \$100,000, was

returned outside the limitations period, the statute of limitations was tolled because the prior indictment, which alleged only a single theft of between \$20,000 and \$100,000, fairly alerted the appellant to the subsequent charges against her because the indictments shared the same factual basis, despite the fact the subsequent indictment subjected the appellant to a greater penalty range, and the appellant was on notice to preserve any facts or defenses available to her for any thefts she committed against the individual named in the indictment.

However, under Appellee's hypothetical-example logic, the defendant would not be on notice to preserve facts of thefts under \$20,000 because no aggregation was alleged in the original indictment, which only concerned itself with a single theft of between \$20,000 and \$100,000. Under this logic, the defendant would only preserve facts of a single theft of between \$20,000 and \$100,000, would ignore facts of thefts that fell outside this range, and would be able to claim that she did not have fair notice of a possible subsequent indictment alleging an aggregate amount between \$20,000 and \$100,000, because aggregation was not originally alleged. However, this type of logic did not persuade the court of appeals, which followed this Court's holding in *Hernandez*:

Therefore, the difference between these indictments is that the first indictment charged Appellant with one of any of the thefts she may have committed from the named individual (with the upward bound of \$100,000),

and the second indictment charged her with every theft she committed from that person pursuant to a scheme or continuing course of conduct.

Accordingly, Appellant was on notice that she could be held accountable for conduct, specifically any thefts she committed, but it was not until the second indictment was returned that she was on notice as to the theory the State would employ to seek a specific range of punishment. In this way, this case is roughly analogous to the court's decision in *Hernandez*.

Ex parte Brooks, 2011 WL 165446, at *4. Ultimately, the court of appeals concluded that the two indictments shared a factual basis, such that the appellant was on notice to preserve any facts or defenses available to her for any thefts she committed against the individual named in the indictment, and that the first indictment tolled the statute of limitations for the subsequent indictment. *Id.* at *6.

Likewise, in *Ahmad v. State*, under Appellee's hypothetical-example logic, a defendant could argue that the first indictment alleging that she buried a training bomb on or about a certain date would only put the defendant on notice to preserve facts germane to possessing or using a fake/training bomb, and nothing more. Under this logic, the defendant could then argue that the first indictment did not give her fair notice to preserve facts to defend against subsequent charges for making a false report about a bomb, or that the "on or about" date allegation could be proven by the State on a different date, again depriving her of notice as to the date of the offense. However, the court of appeals rejected this logic when it compared the facts in that case to *Hernandez*, explaining that the case was much

more like *Hernandez* as opposed to another case with dissimilar facts, and ultimately holding that the two indictments arose from the same conduct. *See Ahmad*, 295 S.W.2d 731. For these reasons, Appellee's hypothetical-example-argument logic was correctly rejected by the Eighth Court, as it simply does not work within the framework of *Hernandez* and its progeny.

IV. Conclusion

The Eighth Court correctly interpreted this Court's precedent in *Hernandez v. State* and *Marks v. State* when it held that the original and subsequent indictments in this case alleged the same conduct and shared the same factual basis such that the original indictment tolled the statute of limitations. For these reasons, Appellee's sole ground accepted for review should be overruled, and the judgment of the Eighth Court of Appeals should be affirmed.

PRAYER

WHEREFORE, the State prays that this Court overrule Appellee's sole ground presented for review and affirm the judgment of the Eighth Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the statement of facts on page 1 through and including the prayer for relief on page 26, contains 5,534 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Ronald Banerji
RONALD BANERJI

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on September 4, 2020, a copy of the foregoing brief was sent by email, through an electronic-filing-service provider, to Appellee's attorney William Ahee, of the El Paso County Public Defender's Office, WAhee@epcounty.com.

(2) The undersigned also does hereby certify that on September 4, 2020, a copy of the foregoing brief was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

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